NO. 88-1074

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

COMMONWEALTH OF VIRGINIA;
EDWARD W. MURRAY, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Petitioners,

v.

DENNIS WALDON STOCKTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The petition for a writ of certiorari in this case presents a single issue: Does *Smith v. Phillips*, 455 U.S. 209 (1982), require that a party attacking a jury verdict on the basis of extraneous contacts with the jury prove actual prejudice.

THERE IS A CLEAR, EXPRESSLY ACKNOWLEDGED SPLIT AMONG THE CIRCUITS.

It is absolutely clear that various federal circuits are divided over the apportionment of the burden of proof in circumstances such as those presented by the instant case. The Sixth Circuit, in *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985), held that *Smith v. Phillips* requires that actual prejudice be shown by one who seeks to attack his conviction based upon a claim of juror partiality. The *Pennell* court expressly declined to draw a factual distinction between cases in which the alleged bias resulted from extraneous contacts and those where the factors were inherent in the jury itself.

> Although *Phillips* involved bias resulting from a juror's potential employment relationship with a law enforcement

agency, the principles set forth in the opinion apply to allegations of jury partiality generally. In essence, *Phillips* reinterpreted *Remmer*.

737 F.2d at 532.

The Sixth Circuit recently noted that it had consistently held that *Smith v. Phillips* reinterpreted *Remmer* and placed the burden upon the defendant to show bias, rather than placing the burden on the government to show that unauthorized contacts were harmless. *United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988).

Moreover, *Pennell* cannot be construed so narrowly as to apply its holding only in cases where the outside contact is discovered during trial. The broad language in *Pennell* belies such a narrow interpretation. "[T]he burden of proof rests upon a defendant to demonstrate that unauthorized communications with jurors resulted in actual juror partiality. Prejudice is not to be presumed." 737 F.2d at 532. Such a distinction creates an almost irresistible temptation to "sandbag" when the defendant becomes aware of the contact during trial, but the court and prosecution do not. The defendant obtains a distinct advantage by making no complaint until after the verdict because he is then accorded an overwhelming presumption of prejudice. He no longer carries the burden of proving actual prejudice, plus he has the luxury of allowing the case to go to its conclusion, holding a powerful trump card should the verdict be unfavorable.

Indeed, a clever defendant will be able to arrange for a "presumptively prejudicial" contact with the jury during the course of his trial and silently keep that ammunition in reserve should he be found guilty. Thus, a strict limitation of *Pennell* (or *Smith v. Phillips*) to the facts is senseless from either a legal or policy standpoint.

Significantly, federal circuit courts have explicitly recognized that the conflict exists. The Sixth Circuit has acknowledged the split, indicating that at least two other courts have disagreed with *Pennell*. *United States v. Zelinka*, 862 F.2d 92, 95 (6th Cir. 1988). *See United States v. Butler*, 822 F.2d 1191, 1195-1196 n.2 (D.C.Cir. 1987); *see also Haley v. Blue Ridge Transfer*, 802 F.2d 1532, 1537, n.5 (4th Cir. 1986). The Fifth Circuit has also acknowledged that *Smith v. Phillips* has been interpreted, at least by the Sixth Circuit, as altering the "presumptive prejudice" test. *Abell v. Potomac Ins. Co.*, 858 F.2d 1104, 1145-1146 (5th Cir. 1988). Moreover, the Fifth Circuit noted that *Smith v. Phillips* cast a "forbidding shadow" on the *Remmer* presumption. 858 F.2d at 1144-45.

The Sixth Circuit's rule gives a defendant a hearing once he establishes a communication to a jury which is "presumptively prejudicial." He must then establish actual bias. *Smith v. Phillips* does not require the party defending the verdict to prove harmlessness beyond a reasonable doubt. The "presumption" acts to assure a hearing. It is not conclusive of the issues raised. The defendant must still make his case.

The Fourth Circuit rule stated in *Haley v. Blue Ridge Transfer* and now the decision below in this case, coupled with the strict evidentiary limitations of Rule 606(b) of the Federal Rules of Evidence, acts to create a *de facto* conclusive presumption *against* upholding a unanimous jury verdict. For example, using the Fourth Circuit's analysis in the instant case, no conceivable set of facts could provide the Commonwealth with evidence sufficient to overcome the presumption of prejudice. That situation does not exist as a result of the nature of the comments made by Puckett. Under the analysis used by the Fourth Circuit, any comment which bore upon the issue then before the jury, thus triggering the "presumption of prejudice", would have been sufficient to vacate the valid state court judgment. The Commonwealth found itself in a "box" created, on the one hand, by a presumption requiring vacation of the sentence, and on the other hand by the preclusion of the available evidence which would have established harmlessness beyond a reasonable doubt.[1]

THE ISSUE PRESENTED IS ONE OF EXCEPTIONAL IMPORTANCE REQUIRING RESOLUTION BY THIS COURT.

The decision below and Rule 606(b) combine to create an intolerable result. Stockton's case was fairly tried and the jury deliberated fully and carefully before reaching the verdict and imposing sentence. The circumstances surrounding the "fry the son-of-a-bitch" remark were reviewed

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[1] Petitioners are not procedurally precluded from presenting the conflict among the circuits as a basis for the writ of certiorari. Manifestly, resolution of such a split is exclusively within the province of this Court and is not a matter subject to the jurisdiction of the courts below. Moreover, petitioners are not precluded from arguing the validity of the *Pennell* decision as opposed to *Haley v. Blue Ridge Transfer*. Petitioners' conditional acceptance of *Haley* in the district court was merely an acknowledgement that *Haley* was controlling precedent in the Fourth Circuit. The attack on *Haley* was pressed on appeal to the Fourth Circuit and the court below addressed that issue on its merits. Accordingly, no bar exists to this Court's consideration of petitioners' arguments.

by the trial court and found not to necessitate disturbance of the sentence. Both the guilt and sentencing phases were reviewed fully on direct appeal to the Supreme Court of Virginia and upheld. Indeed, so little significance was attached to the remark that it was scarcely mentioned in the briefs and received no attention from the Supreme Court of Virginia. The case moved through state habeas corpus proceedings and no cause was found for vacating the death sentence. Nonetheless, the federal collateral attack upon the presumptively valid state judgment has resulted in the vacation of the sentence based solely upon a single, off-hand remark made by an undistinguished individual. The district court and the Fourth Circuit determined that they were compelled to grant relief because the remark met the minimum requirement for being "presumptively prejudicial" -- it touched upon the issue then being considered by the jury. The courts below were forced by Rule 606(b) to disregard the conclusive evidence available from the jurors themselves which absolutely denied any prejudicial influence from the comment.

The result in this case is particularly inappropriate because of its posture -- the case is not a direct appeal, or even a state habeas proceeding, but a federal collateral attack of a state criminal judgment. This posture of the case mandates that a prisoner establish actual prejudice in order to obtain habeas corpus relief. *See United States v. Frady*, 456 U.S. 152 (1982). There is no rational reason why the peculiar facts and circumstances of this case should be treated differently.

This case represents a further intrusion into the finality of state judgments by federal reviewing courts. It is repugnant to the notions of finality of judgment and comity. Comity is "a principle controlling all habeas corpus petitions to the federal courts, . . . those courts will interfere with the administration of justice in the state courts only in rare cases where exceptional circumstance of peculiar urgency are shown to exist." *Rose v. Lundy*, 455 U.S. 509, 515-16 (1982) (quoting *Ex Parte Hawk*, 321 U.S. 114, 117 (1944)). The Fourth Circuit's decision in this case carves out an exception to these well-established principles.

CONCLUSION

This Court should accept this case for review in order to eliminate the confusion that has emerged since *Smith v. Phillips*. The petitioners will be asking this Court to confirm the reasonable construction of *Smith v. Phillips* adopted by the Sixth Circuit in *Pennell*, and its progeny.

The Fourth Circuit rule provides a criminal defendant with a weapon

to attack a unanimous state jury verdict in federal court by showing nothing more than an off-hand comment made in the presence of some jurors. It relieves him of any responsibility to establish prejudice and provides the State with no means to defend against the attack.

For the foregoing reasons, and those stated in the petition, the writ of certiorari should be granted.

Respectfully submitted,

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